Introduction

Prior to 29/12/06 the test for medical negligence accepted by the Courts in Malaysia was generally known as the Bolam Test or the Bolam Principle. This test was applied to determine the doctor’s standard of care in relation to the treatment and information given to the patient.

Justice McNair in his directions to the jury in the case of Bolam v Friern Hospital Management Committee [1957] 2 All ER 118 said that a doctor is not negligent, if he is acting in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, merely because there is a body of such opinion that takes a contrary view.

His Lordship went on to explain the meaning of “negligence” in law in an ordinary case and negligence which involves the use of professional skill. The learned judge said and I quote:

“In the ordinary case which does not involve any special skill, negligence in law means this: some failure to do some act which a reasonable man in the circumstances would do, or doing some act which a reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said, that you judge that by the action of the man in the street. He is the ordinary man.

In one case it has been said that you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.
Bolam v Friern Hospital Management Committee

To appreciate the Bolam Test which is the locus classicus to determine liability for medical negligence in England, it is necessary to first consider the facts of the case itself.

The plaintiff in Bolam’s case, one John Hector Bolam, a salesman, was admitted to Friern Hospital suffering from the after effects of a mental illness of the depressive type. He was examined by the consultant psychiatrist attached to the hospital and was advised to undergo electro-convulsive therapy which was carried out by placing electrodes on the head to allow an electric current from a machine to pass through the brain. One of the results of the treatment was to cause convulsion in the nature of a fit. The consultant psychiatrist did not warn Bolam of the risks involved, one of which was the risk of fracture.

Bolam signed a form consenting to the treatment and nothing untoward happened to him when he received the treatment for the first time. However on the second occasion the treatment was administered by Dr C Allfrey, a senior registrar at the hospital. An initial shock was passed through Bolam’s brain for approximately one second and was followed within approximately four seconds by a succession of five momentary shocks administered for the purpose of damping the amplitude of the jerking movements of Bolam’s body. No further shocks were administered and the convulsion was not unusually violent. The voltage of the current was 150 volts and the frequency was fifty cycles per second.

During this treatment, Bolam lay in a supine position with a pillow placed under his back and his lower jaw was supported by a mouth gag. Otherwise he was not restrained in any way, although a male nurse stood at each side of him in case he should fall from his bed. No relaxant drugs were administered to Bolam prior to the treatment.

In the course of this treatment, Bolam sustained severe physical injuries consisting in the dislocation of both hip joints with fractures of the pelvis on each side which were caused by the head of the femur on each side being driven through the acetabulum or cup of the pelvis.

In claiming damages for his injuries against the management of the hospital, Bolam contended that the hospital was vicariously negligent in permitting Dr Allfrey to administer electro-convulsive therapy without the previous administration of a relaxant drug which would have excluded the risk of fracture altogether or without restraining his convulsive movements by manual control and in failing to warn him of the risk he was taking in
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consenting to have the treatment.

The medical evidence at the trial showed that competent doctors held divergent views on the desirability of using relaxant drugs and restraining the patient’s body by manual control and also on the question of warning a patient of the risks of electro-convulsive therapy. The other medical evidence that was most significant was that the risk of fracture was 1 in 10,000.

The jury found that the hospital was not negligent.

The 2 limbs to the Bolam Test

There are 2 limbs to the Bolam Test. The first is the requirement of a professional person in this case a doctor, to exercise reasonable care in undertaking the task associated with his particular professional calling. The second being commonly invoked, is the assertion that a defendant doctor will not be liable under the first limb if he has complied with a responsible professional practice, allowing for the possibility that there may be more than one such practice.

The legal position is that the doctor must have acted in accordance with an accepted medical practice, and that the accepted practice must be regarded as proper by a responsible body of medical men in that art.

Friern Hospital’s alleged negligence can be summarised into the following three categories:

1. Failure to give Bolam a warning of the risks involved in electro-convulsive therapy so that he might have had a chance to decide whether he was going to take those risks or not;
2. Failure to use any relevant drugs which, if used, could have excluded the risk of fracture altogether;
3. That if relevant drugs were not used then at least some form of manual control beyond shoulder control, support of the chin and placing a pillow under the back should have been used.

Bolam testified that he was not given any warning as to risks, nor asked whether he would not undergo treatment as there is a one in 10,000 risk involved.

The Bolam Test has been approved by the House of Lords in a number of cases
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including Whitehouse v Jordan (1981) and Maynard v West Midlands Regional Health Authority (1985) on the issue of diagnosis and treatment by doctors. The House of Lords in Sidaway v Bethlem Royal Hospital Governors (1985) also approved the Bolam Principle to cover the issue of advice to the patients.

The Bolam Principle was further clarified and supplemented by the House of Lords in the case of Bolitho v City and Hackney Health Authority (1998). There the court stated that the court was not bound to find for a defendant doctor simply because a body of experts testified in his favour. To qualify as a responsible body of opinion, such testimony must have a logical basis. This meant that the medical experts had to have directed their minds to the comparative risks and benefits and have reached a “defensive conclusion” on the matter. The court went on to emphasise that it would be a rare case where professional opinion would fall foul of the threshold test of logic.

Foo Fio Na v Dr. Soo Fook Mun & Anor

The Federal Court, the apex court in Malaysia, on 29/12/06 in its judgment in the case of Foo Fio Na v Dr. Soo Fook Mun & Anor [2007] 1 MLJ 593 declared inter alia, that the Bolam Test which has been the basis in determining the standard of care in medical negligence cases in Malaysia since her independence in 1957 is no longer applicable.

The Federal Court in allowing the appeal and upholding the orders of the trial judge in the High Court on quantum held that the Bolam Test has no relevance to the duty and standard of care of a medical practitioner in providing advice to a patient on the inherent and material risks of the proposed treatment. The practitioner is duty bound by law to inform his patient who is capable of understanding and appreciating such information, of the risks involved in any proposed treatment so as to enable the patient to make an election of whether to proceed with the proposed treatment with knowledge of the risks involved or decline to be subjected to such treatment.

The Court further held that there is a need for members of the medical profession to stand up to the wrong doings, if any, as is the case of professionals in other professions. In so doing people involved in medical negligence cases would be able to obtain better professional advice and that the courts would be appraised with evidence that would assist them in their deliberations. On this basis the Rogers v Whitaker (1992) Test would be a more appropriate and viable test of this millennium than the Bolam Test.
In Foo Fio Na’s appeal the facts insofar as they were not disputed happened in the following manner. The appellant was a front seat passenger in a motor car that crashed into a tree on the night of 11/7/82. The car was driven by her boyfriend and there were two other passengers in the back seat. The accident happened near Assunta Hospital where the appellant and her two companions were brought to and where the appellant was subsequently warded for the following injuries.

1. bruises on the lower abdominal wall;
2. bruises on the right breast;
3. bruises on both anterior iliac spine areas;
4. closed dislocation C4 and C5 vertebrae with bilaterally locked facets.

Injury No (4), the most serious of her injuries caused much pain to her neck each time she moved her head. Dr Celine Pereira, the doctor on duty, prescribed the initial treatment by having X-rays taken of her neck and placing a cervical collar around it. Dr Celine Pereira then contacted the orthopaedic surgeon on duty Dr Soo Fook Mun, the first respondent, who was at home at that time and she was advised that the collar should remain and the appellant stabilized by keeping her in bed and placing sandbags on either side of her head to prevent her from moving her head and to reduce the risk of paralysis. This was accordingly done.

Dr. Soo saw the appellant for the first time the following morning and after examining her, prescribed the first treatment by placing her on traction with weights in a further attempt to reduce the dislocated cervical vertebrae. This proved to be unsuccessful and on 14/7/82, the first respondent performed a manipulation or closed reduction procedure under general anaesthetic to unlock the locked facet joint. Despite three attempts, the first respondent failed to reduce the dislocated cervical vertebrae and on 19/7/82, the first respondent performed the first of two operations to place the dislocated vertebrae into their original positions. This involved an open reduction whereby the nape of the appellant’s neck was surgically opened and the dislocated vertebrae moved to their normal positions and secured by bone grafting and the insertion of a loop of wire to stabilize the spinal cord. X-rays were taken after the surgery.

Unfortunately, this procedure too failed as the appellant became paralysed the day after the operation. Suspecting that the paralysis might be due to vascular infarction, ie when blood supply to the spinal cord is interrupted and cut-off, the first respondent prescribed a course of medication to the appellant by the injection of dexamethasone for over four days. When the appellant’s condition showed no signs of improvement the first respondent called in a neurosurgeon, Dr. Mohandas, to examine the appellant. Following his examination, Dr
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Mohandas did a myelogram test on her on 5/8/82 and he found that the wire loop which was placed to correct the dislocation of C4 and C5 vertebrae during the first operation was pressuring the spinal cord and that was the cause of the total paralysis. As a result of this the first respondent performed a second operation on the appellant on the same day whereby he removed the wire loop. But this treatment too did not remove the paralysis and the appellant continued to be confined to a wheelchair to this very day.

The Federal Court’s decision

Siti Norma Yaacob FCJ (later CJM) in delivering the judgment of the Federal Court distinguished Foo Fio Na from Bolam in that:

“(1) Bolam was a mental patient, and unlike the appellant, who has been described as ‘a bright young lady’ by the Court of Appeal, it is doubtful whether Bolam was in a position to give any consent to any treatment to be given to him;

(2) had a warning of risk been communicated to him, it is also doubtful whether he was in a position to comprehend the true nature of the risks involved;

(3) the risk of injury in the nature of a fracture to Bolam was one in ten thousand. The same cannot be attributed to the appellant as the risk of paralysis was present and real;

(4) unlike Bolam’s case there is no conflicting body of medical opinion adduced in the instant appeal to establish whether the appellant should or should not be warned of the risks of paralysis.”

The question of law which was posed for the determination of the Federal Court was whether the Bolam Test in the area of medical negligence should apply in relation to all aspects of medical negligence. The Federal Court answered the question in the negative.

Rogers v Whitaker

In Rogers v Whitaker the High Court, the apex court in Australia, reconsidered the application of the Bolam Principle under Australian law and held that “except in the case
of an emergency or where disclosure would prove damaging to the patient, a medical practitioner has a duty to warn the patient of a material risk inherent in the proposed treatment. A risk is material if, in the circumstances of the particular case, a reasonable person in the patient’s position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it. The fact that a body of reputable medical practitioners would have given the same advice as the medical practitioner gave does not preclude a finding of negligence. Generally speaking, whether the patient has been given all the relevant information to choose between undergoing and not undergoing the proposed treatment is not a question the answer to which depends upon medical standards or practice.

Rogers v Whitaker concerned a woman who had lost sight of her right eye when she was a child. Having had her eyes checked in 1983 she was referred to an ophthalmic surgeon. Following extensive consultation and incessant questioning by the patient (Mrs. Maree Lynette Whitaker) she undertook eye surgery. The operation was performed very skillfully but the patient developed a condition known as “sympathetic ophthalmia” which resulted in her becoming almost totally blind.

It was accepted on the basis of medical evidence that this was a rare complication with a chance of approximately one in 14,000 cases. The defendant, Dr. Christopher Rogers was sued for a negligent failure to warn of the risks of sympathetic ophthalmia. Many medical experts were called to testify in court on whether the surgeon ought to have warned the patient of the risk involved. The opinions of the medical experts were divided.

If the Australian High Court had followed the Bolam Principle the surgeon would not have been held responsible for the failure to warn. The High Court disapproved the principle stated in Bolam. The High Court held that a finding of medical negligence may be made even though the conduct of the defendant doctor was in accord with a practice accepted at the time as proper by a responsible body of medical opinion.

The High Court further held that a medical practitioner has a duty to disclose what the court called “duty to warn a patient of any material risks inherent in a proposed treatment”. The Court has defined risk as being material, if, “in the circumstances of a particular case and if warned of the risk, a reasonable person in the patient’s position, would be likely to attach significance to it or the risk is also deemed material if the medical practitioner is or should reasonably be aware that the particular patient would be likely to attach significance to it, had they been warned”. In the circumstances since the surgeon had failed to warn the patient of this particular risk he was held liable in negligence.
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There are some doubts as to whether the decision in Rogers v Whitaker rejected the Bolam Principle only in respect of advice. The subsequent decision of the Australian High Court in Naxakis v Western General Hospital (1999) has confirmed that the Bolam Principle does not apply in Australia in the case of advice, diagnosis or treatment. Therefore in relation to diagnosis, treatment and disclosure liability the Australian courts have established that they are the final arbiters of the breaches of the required standard of conduct and not the medical profession itself.

Issues arising from Foo Fio Na

To which aspects of medical negligence should the Foo Fio Na Test apply or to put it in another way which remaining aspects of medical negligence should the Bolam Test apply?

Should the Foo Fio Na Test apply to the treatment as well as the providing of advice?

Siti Noma FCJ (later CJM) held that “we are of the opinion that the Bolam Test has no relevance to the duty and standard of care of a medical practitioner in providing advice to a patient on the inherent and material risks of the proposed treatment. That said, it would mean that the decision in Foo Fio Na is only limited to the giving of advice on material and inherent risks in proposed treatments and that the Bolam Test still applies in relation to diagnosis, treatment and management of a patient.

Under the Foo Fio Na Test patients must be informed of material risks prior to a procedure much as under the Rogers v Whitaker Test.

Under the Rogers v Whitaker Test the Court will decide upon evaluating the evidence adduced that is, the Court will have the final say, whereas under the Bolam Test the Court will defer to the opinion of the medical profession.

In a public lecture entitled, “The Standard of Care in Medical Practices: Has the Pendulum Swung in favour of the patients?” delivered by Prof Denis A. Cusack of the School of Medicine and Medical Science, University College of Dublin, Ireland, in Kuala Lumpur on 16/3/07, Dr. Cusack considered the legal standards for due care and skill of the medical profession on its diagnosis and treatment of patients and how this is balanced with the patient’s right to know as expressed in the law relating to disclosure of risks in such diagnosis and treatment following the decision in Foo Fio Na.
Dr. Cusack stated that **Foo Fio Na** has brought the issue of the application of the **Bolam Test** to a very critical point for Malaysia.

The case has generated a lot of interest in medical negligence amongst patients, doctors, dentists, nurses, administrators of government and private hospitals and of course lawyers. The medical profession in Malaysia consisting of more than 17,000 medical practitioners has expressed serious concern in respect of the decision of the Federal Court.

Dr. Cusack went on to say that the pendulum has swung from a doctor-centered test of disclosure of risk to a patient-centered test. But has the pendulum swung too far in favour of the patient or has it merely swung to a point where the imbalance in favour of the doctor has now been properly corrected in favour of the patient’s legitimate rights? Has the swing been too extreme giving rise to the danger of “defensive medicine” being practiced by a litigation-nervous medical profession?

Following **Foo Fio Na**, Malaysian medical jurisprudence is at an important crossroad. By adopting the **Rogers v Whitaker Test**, the Federal Court has moved from the **Bolam Principle** in relation to advice to be given to patients. What is unclear and therefore uncertain is whether the Courts will in the future apply the **Rogers v Whitaker Test** to diagnosis and treatment as well. Whether Malaysia will extend the **Rogers v Whitaker Test** to diagnosis and treatment or whether it will, as Australia has done following the **Naxakis** case, restrict the **Rogers v Whitaker Test** by legislation to the giving of advice only, is an important decision for the future of healthcare in Malaysia. Anxiety arising from medical negligence claims represent a disturbing aspect of the current medical practice.

Dr. Cusack ended his lecture by stressing that what is now required is an informed and reasoned debate of where the pendulum should swing in order to achieve the proper balance between medicine and law in the best interests of the patient whilst giving full encouragement and support to a properly regulated and competent, caring medical profession.

**Cases after Foo Fio Na**

**Dominic Puthucheary & Ors (personal representatives of the estate of**
Thayalan s/o Kanapathipillai) v Dr. Goon Siew Fong & Anor [2007] 5 MLJ 552

The appellants were the personal representatives of the estate of the deceased. The deceased was found in a drain and taken to the Kuala Lumpur General Hospital. Less than three hours after arriving at the casualty department, he died. The appellants commenced proceedings against the respondents in the High Court claiming the respondents negligently caused his death by failing to diagnose and treat a spinal injury. Two questions were presented for the decision of the High Court: (i) whether either or both respondents were negligent; and (ii) even if either or both were negligent whether their negligence caused his death. The trial judge found for the respondents on both questions and dismissed the appellants’ claim. The appellants appealed to the Court of Appeal.

The Court of Appeal in dismissing the appeal held that central to the plaintiffs’ case was the charge that the first defendant ought reasonably to have suspected a spinal injury and directed treatment accordingly. To arrive at that point it must first be established by evidence that the deceased did suffer a spinal injury. But there was not a jot of evidence that established the point. It was merely a theory advanced by the plaintiffs. Instead, the plaintiffs had attacked the theory advanced by the defendants’ as to the likely cause of the deceased’s death seeking thereby to show that their charge of negligence must be correct. That was insufficient.

Gopal Sri Ram JCA (as he then was) delivering the judgment of the Court held that the plaintiffs quite rightly relied on the recent decision of the Federal Court in Foo Fio Na. In that case, the Federal Court held that the standard of care that a medical practitioner should exercise is now a question which is for the ultimate consideration of the courts and no longer one for the medical profession alone to decide through a responsible body of medical opinion. Gopal Sri Ram JCA (as he then was) when reserving his comments on the correctness of the decision on the actual facts of Foo Fio Na, held that it is one that is plainly binding on this Court.

In Dominic Puthucheary, the Rogers v Whitaker Test was applied in relation to the claim of a misdiagnosis and wrongful treatment. On the principle of stare decisis the Court applied the Foo Fio Na Test and rejected the Bolam Test.
Dr. Ismail Abdullah v Poh Hui Lin (administrator for the estate of Tan Amoi @ Ong Ah Mauy, dec’d) [2009] 2 MLJ 599

The respondent/plaintiff is the administrator of the deceased’s estate. She brought a claim against the first and second appellants/defendants for medical negligence in, inter alia, failing to advise the deceased of the risks of acute pancreatitis and acute respiratory distress syndrome (‘ARDS’) prior to the operation by the first appellant on the deceased to remove kidney stones that were causing biliary obstruction. The first appellant stated, inter alia, that the deceased had been advised on and consented to the operation. The Sessions Court did not hold the applicants liable for negligence when treating the deceased but held that they were liable for failing to advise the deceased of the risks.

In allowing the appeal with costs Azahar Mohamed J (now JCA) held that the appellants were not liable as only material risks of injury need to be disclosed, not minimal risks.

The Rogers v Whitaker Test was applied by the Judge to reverse the decision of the Sessions Court. The Bolam Test was not applied.

The learned Judge further held that the decision of the Federal Court in Foo Fio Na represents the law on this subject as applied today. Some very important principles (as established in Rogers v Whitaker (followed in Foo Fio Na)) were (i) only material risks of injury arising out of treatment or surgery needed to be disclosed to a patient; (ii) the materiality or non-materiality of a risk often requires expert evidence; and (iii) the therapeutic privilege allowed a surgeon to withhold disclosure of a material risk in the best interests of a patient.

On the effect of therapeutic privilege on non disclosure of a material risk, the learned Judge went on to say:-

“If there was in fact a material risk as a result of the operation, the first defendant’s therapeutic privilege justified the non-disclosure of it because of her severe medical problems. This privilege says that such information can be withheld if the disclosure would cause serious harm to the patient’s health. The deceased needed the operation to save her life. The first defendant’s therapeutic privilege outweighed any duty to warn her of any material risk which would result in her refusing the life saving operation.”
Hasan Datolah v Kerajaan Malaysia [2010] 5CLJ 764

The appellant appealed against the decision of the High Court judge in dismissing his claim against the respondent, the Government of Malaysia, for the negligence of their agents or servants in the performance of two surgical procedures on him. The allegation of negligence pleaded at the trial in this appeal were (a) failing to take reasonable care and skill during the operation so as to negligently cause damage to the appellant’s spinal nerve resulting in complete paralysis of his waist and lower limbs; (b) failing to inform him of the inherent risk involved in the operation, which he would not have agreed and/or consented to undergo had he been properly advised. The trial judge found that the orthopaedic surgeon of Hospital Kuala Lumpur had acted properly and adequately according to competent medical practice, and that he had properly explained to the appellant the risk of the surgery and dismissed the appellant’s claim.

The Court per Sulaiman Daud JCA in dismissing the appeal with costs held that the judge had not erred when he found that the injury suffered by the appellant which resulted in his paralysis was not caused by the negligence of the doctor in the performance of both the surgeries but was the result of delayed treatment. The trial judge had properly assessed and weighed all the evidence before her, particularly the opinion of the expert witnesses on the probable cause of the appellant's paralysis, before arriving at her decision. The trial judge’s finding was based on two broad grounds, firstly, she was of the view that there was no evidence led to show that the injury to the appellant’s nerve was caused by the negligent act of the doctor in performing the two surgeries; and secondly, she accepted the evidence of two other witnesses that the spinal injury sustained by the appellant was a serious one and that the delay in seeking medical treatment had aggravated his injury which eventually caused the paralysis. The trial judge had not misdirected herself on the evaluation of the evidence before her.

The Court also agreed with Counsel for the respondent that Foo Fio Na had without doubt rejected the Bolam Test in so far as it relates to the determination of the standard of care to be observed by a medical practitioner in a medical negligence suit. The right or responsibility to make such a determination now rests with the court upon evaluation of the evidence before it, including the opinion and practices of members of that profession.

It will be noted that in this case the Court of Appeal applied the Rogers v Whitaker Test not only to the provision of advice but in relation to the treatment as well. The Bolam Test was wholly rejected for all aspects of medical negligence.
Conclusion

The debate as to whether the ratio in the Federal Court decision of Foo Fio Na was intended or meant to be restricted to cases relating to negligent advice only and not to all aspects of medical negligence continues.

Foo Fio Na has not been revisited or reconsidered in any Federal Court decision on medical negligence post December 2006.

Due to the perceived uncertainty the medical profession and defence counsel face many difficulties. To resolve the uncertainty a review of the law on medical negligence needs to be undertaken to clear the lingering doubts. Legislation, as was enacted in Australia after the Naxakis v Western General Hospital may be necessary to address the concerns of the medical profession and its advisors in Malaysia.²

Looking across the causeway, it will be noted that the Bolam Principle has not been rejected by the Singapore Courts. The Bolam Principle was reviewed in the case of Dr. Khoo James & Anor v Gunapathy d/o Muniandy (2002) when in a strongly worded judgment the then Chief Justice Yong Pung How had this to say:

“This is why the legal principle in Bolam v Friern Hospital Management Committee restrains the judiciary from treating medical experts as they would any other. In determining whether a doctor has breached the duty of care owed to his patient, a judge will not find him negligent as long as there is a respectable body of medical opinion, logically held, that supports his actions. Beyond this time-honoured test of liability, neither this court nor any other should have any business vindicating or vilifying the acts of medical practitioners. It would be pure humbug for a judge, in the ratified atmosphere of the courtroom and with the benefit of hindsight, to substitute his opinion for that of the doctor in the consultation room or operating chamber. We often enough tell doctors not to play god; it seems only fair that, similarly, judges and lawyers should not play at being doctors”.

* This paper was delivered by Mah Weng Kwai on 9.5.2012 at the Annual Scientific
Congress 2012 organised by the Royal Australasian College Of Surgeons held at the Kuala Lumpur Convention Centre from 6-10 May 2012.
